



1 him while he is in custody. At the end of the conference, the Court instructed the United States to  
 2 respond in writing to this argument. For the reasons discussed below, the defendant's argument with  
 3 respect to discovery logs should be DENIED.

## 4 **II. ARGUMENT**

### 5 **A. The Protective Order**

6 As this Court will recall, after extensive litigation, the Honorable U.S. District Court Judge  
 7 Charles R. Breyer issued a protective order in this case governing the disclosure of discovery materials.  
 8 Order, Docket No. 302. The protective order was entered over the objection of the defendant. Order  
 9 Granting Motion for Protective Order, Docket No. 301. In issuing the order, the Court noted that  
 10 "[g]iven the volume of sensitive material and the fact that it is so enmeshed with non-sensitive material,  
 11 the protective order negotiated... is both practical and appropriate." Docket No. 301 at pg. 3. The Court  
 12 further noted that absent a protective order, unauthorized disclosure of discovery materials "risks not  
 13 only bodily harm to undercover agents, but reputational harm to individuals who would be collateral  
 14 damage.... In the case of public officials, there is also a risk of unfairly undermining their abilities to  
 15 govern. An investigation of government corruption conducted by means of wiretap will include  
 16 speculative discussions about numerous public officials, when those individuals are not parties to the  
 17 discussion, cannot interject to defend themselves, and never went on to act in a corrupt or criminal  
 18 manner." Docket No. 301 at pg. 4.

19 In light of these concerns, the protective order issued by the Court restricts disclosure of  
 20 discovery materials only to certain individuals, including among others, counsel for the defendants, staff  
 21 members working with counsel, experts and investigators hired by counsel, and defendants, in the  
 22 presence of counsel or counsel's staff. The protective order requires the defendants to keep a log of any  
 23 discovery materials provided to experts and investigators, and outlines a process by which the logs can  
 24 be reviewed, in the event of a breach of the protective order. Finally, the protective order allows for  
 25 custodial defendants to review discovery materials outside the presence of counsel, under conditions to  
 26 be determined. *See, generally*, Docket No. 302.

1 The defendant moved the Court to reconsider the issuance of the protective order, based on  
 2 alleged “blatant, gross, and irresponsible misrepresentations” by counsel for the United States. Def.  
 3 Mot. to Reconsider, Docket No. 369. The Court summarily denied that motion. Docket No. 459.

4 **B. Logs**

5 At issue now are the conditions to be determined under the protective order with respect to  
 6 defendants in custody. The defendant seeks a stipulation from the United States allowing him to retain  
 7 discovery materials in his possession while in custody. The United States is willing to enter into such a  
 8 stipulation, and in fact has done so with respect to other defendants, but only if defendants keep a log of  
 9 discovery materials that they are retaining while in custody. Other defendants have agreed to this  
 10 provision. *See, e.g.*, Order on Stipulation, Docket No. 429. The reasoning for such a provision is clear:  
 11 if a leak occurs, both the Court and the United States need to be able to determine who has had access to  
 12 leaked materials. Such leaks have unfortunately occurred with some regularity in this district. *See, e.g.*  
 13 February 18, 2014, Order Requiring Declarations from Defense Counsel, Docket No. 6088, in *United*  
 14 *States v. Cerna*, 08-00730-WHA.

15 The defendant refuses to keep such a log, on the grounds that it would constitute work product.  
 16 However, he cites no case law, no statute, and no rule in support of his conclusion. *See, generally*, Def.  
 17 Mot. to Allow Use of MP3 Player, Docket No. 484. The work product privilege was described in  
 18 *Hickman v. Taylor*, 329 U.S. 495, 511 (1947) as covering the “work” of attorneys “in interviews,  
 19 statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless  
 20 other tangible and intangible ways – aptly though roughly termed . . . as the ‘Work product of the  
 21 lawyer.’” That opinion went on, however, to recognize that these work product materials were not  
 22 “necessarily free from discovery in all cases.” *Id.* That “the general policy against invading the privacy  
 23 of an attorney’s course of preparation is so well recognized and so essential to an orderly working of our  
 24 system of legal procedure that a burden rests on the one who would invade that privacy to establish  
 25 adequate reasons to justify production through . . . a court order.” *Id.* at 512. Here, the reasons are  
 26 clearly adequate: to enforce Judge Breyer’s protective order in the event of a leak.

27 In *United States v. Nobles*, 422 U.S. 225 (1975), the Supreme Court affirmed that the work  
 28 product privilege applied in criminal cases as well as in civil cases, and stated that “[a]t its core, the

1 work-product doctrine shelters the mental processes of the attorney, providing a privileged area within  
2 which he can analyze and prepare his client's case." *Id.* at 238. It also again recognized that "[t]he  
3 privilege derived from the work-product doctrine is not absolute." *Id.* at 239. What the United States  
4 seeks the custodial defendants to maintain, i.e., a log of discovery materials retained by while in  
5 custody, is not attorney "work product." It is not the "mental processes of the attorney." It is simply a  
6 list identifying those materials that an attorney is allowing the defendant to retain while in custody –  
7 materials that, by the time any logs would be viewed by the Court, would have already been leaked in  
8 violation of the Court's order.

9       Even if the logs are deemed to be work product material, the Court has suggested, and the United  
10 States is amenable to, a procedure by which such logs could be reviewed in the event of a leak, without  
11 compromising any defense strategies. The United States would advise the Court that a leak may have  
12 occurred; the Court would then review the logs itself and take whatever measures it deems appropriate –  
13 questioning witnesses, appointing its own investigators, or whatever other means it sees fit to investigate  
14 the leak. The Court could also advise the United States of the identities of those individuals who,  
15 according to the Court's review of the logs, possessed leaked materials, so that the United States could  
16 conduct its own investigation. Either way, the United States would not be privy to the logs themselves.  
17 Indeed, such a procedure is already outlined in the protective order, with respect to logs documenting the  
18 disclosure of discovery materials to defendants' experts and investigators. This is precisely the type of  
19 reasonable, limited measure that is appropriate to a protective order and well within the Court's  
20 discretion to impose, pursuant to its authority under Rule 16(d)(1).

21       Moreover, requiring defendants in custody to maintain logs of materials that they retain in their  
22 possession is entirely consistent with Judge Breyer's protective order. That is, non-custodial defendants  
23 are not permitted to retain copies of discovery materials; they may only review them under controlled  
24 conditions. Detained defendants are in a different position, unable to visit counsel's office where  
25 discovery materials must be maintained. These practicalities demand that defense counsel actually  
26 release the discovery materials to their custodial clients. What the United States seeks in requiring a log  
27 is no more than is required in the protective order when discovery materials are released from the  
28 custody of counsel to investigators and expert witnesses.

1 **III. CONCLUSION**

2 For the reasons discussed above, the defendant's argument with respect to discovery logs should  
3 be DENIED.

4 DATED: September 22, 2014

Respectfully submitted,

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7 /s/  
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